**MEMORANDUM**

**TO:** **Lawrence W. Lewis, State Solicitor**

**FROM:** **Judy Oken Hodas, DAG**
**Kevin Maloney, DAG**

**DATE:** **April 1, 2011**

**RE:** **Right of Public to Record Open Meetings of Public Bodies**

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## ISSUE

Do members of the public have a right under the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA") or the First Amendment to record, by audio, video or photography, public meetings of public bodies?

## ANALYSIS

FOIA is silent on this issue. It only says that the public must have the right to "observe the performance of public officials and to monitor the[ir] decisions[.]" 29 *Del. C.* § 10001. Arguing from the absence of language specifically conferring a right to record, one could say that FOIA does not require a public body to allow recording. That is the argument advanced by the dissent in *Csorny v. Shoreham-Wading River Central Sch. Dist.*, 759 N.Y.S.2d 513, 519 (A.D. 2003). However, the majority, like the majority of courts that have considered this question, found that there is "no legitimate reason to prohibit [video cameras] from public meeting rooms[.]" *Id.* *Csorny* rejected each argument against allowing recording. It called "'wholly specious'" the argument that speakers at a public meeting that is being recorded will feel inhibited from speaking freely (or at all): "While the Board adduced affidavits from three parents who expressed their fears of being videotaped at meetings, the Board may not hold the law hostage to the personal fears of a few individuals." *Csorny*, 193 F.3d at 518. It rejected the

obtrusiveness argument. *Id.* Of course, public bodies may make reasonable rules regarding recordings so the meeting is not disrupted. *Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1048 (N.J. 2007) (permissible to regulate "the number and type of cameras", their position, "the activity and location of the operator, lighting" etc. (internal quotation marks omitted)).

The First Amendment does not create a right to *video* public meetings. *Whiteland Woods, LP v. Township of West Highland*, 193 F.3d 177 (3d Cir. 1999) (no federal constitutional right to video record). There might be a constitutional right to *tape record* public meetings. *Belcher v. Mansl*, 569 F.Supp. 379 (D.R.I. 1983)(observing that there is no rational basis for banning tape recording, but finding right to record in the open meetings act and therefore avoiding constitutional issue); *but contra*, *Rice v. Kempker*, 374 F.3d 675, 677-78 (8th Cir. 2004) (no First Amendment right to record by camera or audio tape).

As noted in *Csorny*, in 1985, a Massachusetts court, denying the right to record a public meeting, stated:

> There may come a time when sound cameras will be so thoroughly accepted, and any idea that they could distort or offend decorum so anachronistic, that to bar them would seem the equivalent of prohibiting pencil and paper.

*Csorny*, 193 F.3d at 519 (quoting *Wright v. Lawrence*, 486 N.E.2d 1151, 1153-1154 (Mass. App. 1985). *Csorny*, in 2003, found that "video cameras may not yet have achieved parity with pen and paper at the local level[.]" *Id.* But in 2011, when everyone has a cell phone, and most cell phones have camera, even video, capability, that time has arrived. To attempt to ban recording is as pointless as trying to prevent citizens from taking notes.

## CONCLUSION

The DOJ should advise its client public bodies that to outright prohibit any recording of public meetings is highly risky. The law is evolving in a more permissive direction.